MALAYSIAN REPORTS

Public Prosecutor v Chong Wei Kian

HIGH COURT (JOHORE BAHRU) — CRIMINAL TRIAL NO 58-1 OF 1986
JAMES FOONG JC
23 JUNE 1990

Criminal Law — Dangerous drugs — Trafficking in — Presumption of trafficking — Burden on prosecution of proving possession of dangerous drugs in order for presumption of trafficking to apply — What constitutes possession — Dangerous Drugs Act 1952, ss 37(b), (d), (g), 39B(1)(a) & 39B(2)

Evidence — Expert evidence — No evidence tendered to show qualifications and experience of expert witness — No expert evidence to show substance was heroin

The accused was charged with trafficking heroin weighing 19.408g contrary to the Dangerous Drugs Act 1952. The drugs were discovered in a room allegedly occupied by the defendant. The prosecution relied on the presumptions of trafficking laid down in the Act, namely, that the defendant was in possession of the heroin.

Held, acquitting and discharging the accused without calling upon the defence:

(1) Under s 39B(1)(a) of the Dangerous Drugs Act 1952, the prosecution must adduce evidence to the effect that the accused was in possession of the heroin for the presumption of trafficking to apply. Evidence should be adduced that the accused was an occupier of the room or appeared to have the care and management of the room. The mere presence of the keys obtained in his pockets, the passport and the bank book bearing the accused's name are insufficient evidence to activate the presumption of trafficking without further evidence of possession being adduced by the prosecution.

(2) Doubts were cast on the prosecution's case since it could not be said with certainty that the accused had exclusive possession of the room in which the drugs were found. The prosecution had not called any other witnesses to testify whether the accused was a tenant or even an occupier of the room. Neither were there any exhibits such as other personal effects tendered to show (besides the passport and the bank book) that he had exclusive rights to use the room.

(3) On the facts of the case, there was insufficient evidence of exclusivity of possession for the presumption of trafficking to apply. The prosecution had thus failed to prove a prima facie case against the accused.

(4) The court also ruled that the witness giving evidence as to the heroin and its weight was not an expert witness. No evidence was tendered to show his qualifications and experience except the fact that he had been a chemist for 18 years. Without the evidence of an expert, the court cannot find that the substances found are defined as heroin under the Dangerous Drugs Act 1952.

Cases referred to
1 *PP* v *Aris bin Yunus* [1989] 1 CLJ 239 (folld)
2 *Wong Chop Saow* v *PP* [1965] 1 MLJ 247 (folld)

Legislation referred to
Dangerous Drugs Act 1952 ss 37(b), (d), (g), 39B(1)(a), 39B(2)

Hadariah bte Syed Ismail (Deputy Public Prosecutor) for the prosecution.
RK Menon for the accused.

Cur Adv Vult

James Foong JC: The accused is charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952.

The charge against him is as follows:

> That you on 9 October 1984 at about 10pm at No 96-D Jalan Wong Ah Fook, Johore Bahru, in the District of Johore, in the State of Johore, did on your own behalf traffic in dangerous drugs, to wit, 'Heroin' weight 19.408g, in contravention with the provisions of s 39B(1)(a) of the Dangerous Drug Act 1952, and that you have thereby committed an offence punishable under s 39B(2) of the said Act, Act 234 (Rev 1980).

The facts of this case are as follows. On 9 September 1984, one Inspector Kamaludin Kassim (PW1) attached to the Balai Polis Central in Johore Bahru together with his team of policemen comprising Corporal Badron (PW2), DPC Muda, DPC Abdul Wahid and DPC Asaari while on patrol stopped the accused along the five-foot way at Bangunan Tan Cheng, Jalan Meldrum, Johore Bahru at or about 10 pm. On questioning the accused, the accused led Inspector Kamaludin and his said team of men to premises 96-D Jalan Wong Ah Fook, Johore Bahru. There, using a set of two keys recovered from the trousers pockets of the accused, the police opened the front grill door to the said premises. There were five rooms with an addition of one seating room to the said premises as shown in sketch plan (P9).

Again with the set of keys earlier taken from the accused, Inspector Kamaludin opened a room marked X on the sketch plan, as shown by the accused to him.

In the room he found a box with old newspapers piled on top. In this box he found a bottle (P7) and two small plastic packets (P6A and B) containing substance believed to be heroin. Among the old newspapers he also found two small plastic packets (P6C and D) which contained substances which he believed to be heroin.

Besides that he also recovered from the said room a restricted passport only for entry to Singapore (P3) in the name of the accused and a Public Bank bank account book (P2) in the name of the accused.

The accused was then arrested and brought to Balai Polis Cawangan Anti Dadah (CAD) Johore Bahru where, together with the exhibits, the accused was then handed over to Inspector Jasbir Singh (PW5), the investigating officer.

Inspector Jasbir Singh being new to the job, as he admitted in evidence, at that material time went to the scene of crime only on 21 October 1984 — some ten days after the event. On arrival at room X of the said premises he found the room unlocked and completely emptied as shown in photos P10E and F.

The room D he observed was partitioned but not completely sealed off from the ceiling of the premises. It leaves a gap which according to him was big enough for a person to climb into the room.

Det Sgt Badron (PW2), who was a member in the raiding party, threw some light to the contents of the room. According to him it contained a plastic cupboard, a green coloured mattress, a pillow, a box and many old newspapers.

The suspected drugs were sent by Inspector Jasbir Singh to the Chemistry Department, Johore Bahru for analysis. One Mr Qua Sai Chuan (PW4) from the Chemistry Department was called to testify. He said, 'Saya bertugas sebagai seorang ahli kimia selama 18 tahun.' After that he proceeded to give evidence to say that the substances which were sent to him by Inspector Jasbir Singh for analysis are heroin and have a net weight of 19.408g.

At the close of the prosecution's case, the court heard submissions from both the learned DPP and the defence counsel. I held that the prosecution had failed to prove a prima facie case against the accused.

The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in heroin, a dangerous drug listed under sch 1 of the said Act. Under this section, the prosecution must adduce evidence to the effect that the accused was in possession of the said heroin. The evidence which the prosecution relied on to prove their point are as follows:

(a) the accused informed the police where he lived,
(b) thereafter the police went to the said premises and using a set of keys taken from the accused's pocket gained entry into room X,
(c) there besides the heroin they also recovered the passport and bank account book with the accused's name thereon.

The learned DPP in her submission relied on the presumption as laid down under s 37(b), (d) and (g) of the Dangerous Drugs Act 1952.

I find that the prosecution has not adduced sufficient evidence to evoke the presumption under s 37(b).

Section 37(b) requires evidence to show that the accused was an occupier of room X or had or appeared to have had the care and management of the said room. The mere presence of the keys obtained from his pocket, the passport and the bank book bearing his name found therein are insufficient evidence to activate this presumption without further evidence being adduced by the prosecution.

Without any further evidence many doubts are cast such as:

(a) how many people have keys to the said room X,
(b) is the accused the only person having the key to room X,
(c) could there be other occupiers to room X,
(d) could some one have climbed over the partition to enter into the room X since the room's partition does not meet the ceiling of the said premises,
(e) has the accused the exclusive use of the room,
(f) did the accused have or appeared to have had the care and management of room X,
(g) could there be other people besides the accused who can enter and leave the said room freely.

The prosecution had not called any other witnesses to testify as to whether the accused was a tenant or even an occupier of room X. Neither are there any exhibits such as other personal effects tendered to show (besides the passport and bank book) that he has the exclusive right to the use of the said room. In fact investigation in this case was so poorly conducted that by the time Inspector Jasbir Singh went to the scene of the crime some ten days later, all the things in the room were gone. Photograph P10 shows an empty room.

Adopting the views of Mr Justice Shankar in *PP* v *Aris bin Yunus*,[1] 'there must be a sufficient exclusivity of possession to make a person an occupier'. In this case, I find that such evidence is absent.

Again under s 37(d) of the Dangerous Drugs Act 1952 the presumption therein cannot arise since basing on the same principles stated above, the accused cannot be said to have had in custody or under his control the heroin.

The learned DPP also submitted that under s 37(g) of the Dangerous Drugs Act 1952, the presumption therein also applies in this case. To this I do not agree. Before this presumption can be activated there must be evidence of exclusive possession to make the accused an occupier. In this case there is no evidence proved beyond reasonable doubt of this fact.

I also ruled that the witness Qua Sai Chuan (PW4) is not an expert witness. No evidence was tendered to show his qualification and experience except the fact that he has been a chemist for 18 years. Without the evidence of an expert, I cannot find that the substance in the four small plastic packets (P6A to D) and the bottle (P7) is heroin as defined under the Dangerous Drugs Act 1952.

In this respect I would like to quote the advice of the late Mr Justice Hashim given in the case of *Wong Chop Saow* v *PP*:[2]

> May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualification as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts. He should then proceed to describe ...

This approach should be followed by all parties tendering evidence of expert witnesses.

I am sad to say that even the box in which the bottle (P7) suspected to contain heroin which was an item seized and handed over to Inspector Jasbir Singh by Inspector Kamaludin was not tendered to the court. I was informed by the learned DPP that this box is missing. This causes a break in the chain of the prosecution's case. The investigation and the subsequent conduct of this case is a far cry from the standard I would have expected from the prosecution.

In view of the aforesaid, I acquitted and discharged the accused without calling upon him to enter his defence.

Accused acquitted.

Solicitors: *RK Menon & Co.*

Reported by *Azra Moiz*

Tan Tin Swee v Kangar Properties Sdn Bhd

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 23-99-86
KC VOHRAH J
21 JUNE 1990

Civil Procedure — Judgment in default of appearance — Application to set aside — Whether defendant misled as to the place at which appearance should be entered — Whether judgment obtained prematurely — Whether irregularities curable — Rules of the High Court 1980, O 12 & O 13

This is an application by the defendant to set aside a judgment for $1.1m entered in default of appearance. The application was heard in chambers and dismissed. On further argument in open court, the defendant contended that the judgment was obtained prematurely and the place at which appearance should be entered was in doubt.

Held, allowing the defendant's application:

(1) It was not categorically stated in the writ where appearance could be entered; appearance has to be entered at the Alor Setar registry but that part of the memorandum subscribed in the writ which states that the defendant may enter appearance by post stated that appropriate forms may be obtained from the High Court registry at Kangar and that may well have given the impression that appearance should be entered in the Kangar High Court Registry.

(2) Since the writ was issued at the Alor Setar High Court Registry and served outside the local jurisdiction at Kangar, Perlis, the time limited for appearing should have been 12 days. In the present case, when judgment in default of appearance was entered, 12 days had not lapsed from the date of service; judgment in default was thus obtained prematurely.

(3) Since the judgment was obtained prematurely and there was also doubt as to the place at which appearance should have been entered, then the judgment obtained is clearly a nullity and should be set aside ex debito justitiae.

Legislation referred to
Rules of the High Court 1980 O 12, O 13

M Padmanathan for the defendant/applicant.
Ravindran for the plaintiff.

Cur Adv Vult

KC Vohrah J: On 28 October 1986, the plaintiff entered judgment by default of appearance of the defendant, a company. The judgment against the defendant was for $1.1m being the amount due and payable by the defendant to the plaintiff on an agreement.

On 3 January 1989, the defendant filed an application to set aside the said judgement in default of appearance on the ground that the defendant was not served with the writ on the date and place as stated by the process server in his affidavit; that though one of the directors had signed on the proof copy of the writ as she having been served with a writ on 18 October 1986 and at Kangar, her signature was in fact obtained in Penang and had been obtained through undue influence on the part of the plaintiff.

The application to set aside was heard in chambers and dismissed. On further argument in open court, I allowed the application and set aside the default judgment ex debito justitiae.

In the proof copy of the writ served on the defendant, the day of the week on which it was served is not endorsed as required under O 10 r 1(4) and the plaintiff is not entitled to enter judgment in default of appearance of the defendant unless the court otherwise orders. Notwithstanding that it was not so endorsed the process server has stated in his affidavit that he had endorsed the day of the week on the writ. In fact the affidavit of service itself did not give the day of the week when the writ was served and this was non-compliance with a requirement under O 62 r 9. All these are irregularities but are ordinarily curable in the light of O 2. But I had to consider these irregularities in the context of some other irregularity which I considered as not being curable.

The nature of the other irregularity is this. The time limited to the defendant for appearing under O 12 r 4(a) in the case of a writ served within the local jurisdiction of each High Court in Malaya is eight days after service of writ (including the day of service). But if served outside such local jurisdiction, the time limited for appearing is 12 days. In the present case, although the writ purports to have been issued in the High Court at Kangar, Perlis, in actual fact it was issued in the registry of the High Court, Alor Setar, Kedah for service in Kangar. It has been the practice for all writs and other originating